

#### **Rule 405. Methods of Proving Character.**

(a) **By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) **By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, or pursuant to Rule 404(c), the character or trait may also be proved by relevant specific instances of the person's conduct.

#### **Comment to 2012 Amendment**

The language of Rule 405 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

#### **Cases**

##### **Paragraph (a) — Reputation or opinion.**

405.a.010 When a party is permitted to introduce evidence of character, the party may do so either by reputation or opinion testimony.

*State v. Rockwell*, 161 Ariz. 5, 775 P.2d 1069 (1989) (defendant was permitted to introduce his character trait of fabrication, and did so by asking witnesses whether they had an opinion about his character trait of fabricating).

*State v. Fish*, 222 Ariz. 109, 213 P.3d 258, ¶¶ 25–28 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; defendant was permitted to offer evidence of victim's character for violence, but could do so only through evidence of opinion or reputation).

405.a.020 Before a witness may testify about a person's reputation, the proponent must show that the witness had sufficient contact with the person or the person's acquaintances during a relevant time period so the witness would know what the person's reputation is.

*Selby v. Savard*, 134 Ariz. 222, 655 P.2d 342 (1982) (because defamation action involved events after 1968, evidence of plaintiff's reputation in late 1950s was irrelevant).

*State v. Jessen*, 130 Ariz. 1, 633 P.2d 410 (1981) (police detective's "opinion" testimony about victim's reputation for involvement in organized crime not admissible as lay opinion of victim's character or reputation because not based upon personal knowledge, nor did detective's sources have personal knowledge of victim's character or reputation).

*State v. Riley*, 141 Ariz. 15, 684 P.2d 896 (Ct. App. 1984) (because witness did not know of informant's reputation with law-enforcement community, witness not permitted to answer question of what informant's reputation was).

405.a.030 Because a witness may give the witness's own opinion on a character trait, it is permissible to ask the witness if the witness *knows* about a certain event, rather than limiting the question to whether the witness has *heard* about the event.

## ARIZONA EVIDENCE REPORTER

*State v. Rainey*, 137 Ariz. 523, 672 P.2d 188 (Ct. App. 1983) (proper to ask defendant's character witness, on cross-examination, if he knew defendant had been cited by racing commission for filing frivolous claim).

405.a.040 A party may establish character traits by both expert and non-expert opinion.

*State v. Christensen*, 129 Ariz. 32, 628 P.2d 580 (1981) (for first degree murder, psychiatrist may testify about defendant's character trait of impulsivity as it relates to premeditation).

*State v. Jessen*, 130 Ariz. 1, 633 P.2d 410 (1981) (police detective's "opinion" testimony about victim's reputation for involvement in organized crime not admissible as lay opinion of victim's character or reputation because not based upon personal knowledge, nor did detective's sources have personal knowledge of victim's character or reputation).

405.a.050 Once a witness has offered character evidence on direct examination or cross-examination, the other party, on cross-examination or redirect, may ask the witness about knowledge of specific instances of conduct relevant to the character trait presented.

*State v. Lopez*, 174 Ariz. 131, 139, 847 P.2d 1078, 1086 (1992) (defendant's character of being nonviolent individual who was caring when dealing with children was relevant to murder charge resulting from beating death of 1-year-old victim, thus trial court erred in not admitting that evidence; because state would then have had right to introduce evidence that defendant had been convicted of child molestation 1 month before trial, exclusion of evidence did not prejudice defendant).

*State v. Rockwell*, 161 Ariz. 5, 775 P.2d 1069 (1989) (because defendant was permitted on cross-examination to ask state's witnesses' opinions about defendant's character trait, state was permitted on redirect to ask witnesses about specific instances of defendant's conduct).

*State v. Rockwell*, 161 Ariz. 5, 775 P.2d 1069 (1989) (cross-examination of character witness about specific instances is permissible so jurors can evaluate whether witness's opinion about character trait is well-founded).

*State v. Romero*, 130 Ariz. 142, 634 P.2d 954 (1981) (in child molestation prosecution, it was proper for prosecution to ask defendant's character witnesses if they had heard of defendant's prior arrest for an incident in which he accosted two 6-year-old children).

*State v. Romar*, 221 Ariz. 342, 212 P.3d 34, ¶¶ 5-10 (Ct. App. 2009) (defendant was charged with sexual offenses against child; defendant had two 22-year-old convictions for sexual abuse; defendant indicated he would call eight to ten character witnesses; trial court ruled that state would be permitted on cross-examination to ask character witnesses if they knew defendant had two prior convictions, but would not allow state to specify name or nature of offenses unless character witnesses gave their opinion that defendant would not commit "such a crime" (opinion does not state whether "such a crime" is offense charged or prior offense); at trial, defendant did not call any character witnesses; court held that, by failing to call character witnesses, defendant failed to preserve his claim of error, and thus court declined to consider correctness of trial court's ruling).

*State v. Luzanilla*, 176 Ariz. 397, 861 P.2d 682 (Ct. App. 1993) (once defendant introduced expert testimony that he did not suffer from any diagnosable mental disorder often found in individuals who have a propensity for violence, state was permitted to introduce photographs of defendant's tattoos, one showing "grim reaper" and other a horned skull, and ask expert

## RELEVANCY AND ITS LIMITS

whether he had considered those tattoos in reaching his conclusion), *approved in part on other grounds and vacated in part on other grounds*, 179 Ariz. 391, 880 P.2d 611 (1994).

*State v. Stabler*, 162 Ariz. 370, 783 P.2d 816 (Ct. App. 1989) (once psychiatrist gave his opinion about defendant's character trait of acting reflexively in response to victim's homosexual advances and gave facts upon which he had based his opinion, state was permitted to ask psychiatrist whether he had considered defendant's mother's report that defendant had been disciplined twice for homosexual activity while in custody; psychiatrist admitted he had read report but did not believe it).

*State v. Cano*, 154 Ariz. 447, 743 P.2d 956 (Ct. App. 1987) (evidence of specific acts is admissible on cross-examination once a party puts person's character in issue; because no one put victim's character for violence in issue, defendant never had right to introduce evidence of specific acts, and therefore was not entitled to discovery of guard's records for purpose of learning whether they contained information showing that guard was predisposed to provoking altercations).

*State v. Lehman*, 126 Ariz. 388, 616 P.2d 63 (Ct. App. 1980) (in assault prosecution, defense character witness testifying that defendant had a non-violent character was properly cross-examined about his knowledge of specific instances of violent conduct by defendant).

405.a.055 Once the trial court has ruled the state may ask defendant's character witnesses on cross-examination whether they know about the defendant's prior conviction, if the defendant does not then call those character witnesses to testify, the defendant may not question on appeal the trial court's ruling.

*State v. Romar*, 221 Ariz. 342, 212 P.3d 34, ¶¶ 5–10 (Ct. App. 2009) (defendant was charged with sexual offenses against child; defendant had two 22-year-old convictions for sexual abuse; defendant indicated he would call eight to ten character witnesses; trial court ruled that state would be permitted on cross-examination to ask character witnesses if they knew defendant had two prior convictions, but would not allow state to specify name or nature of offenses unless character witnesses gave their opinion that defendant would not commit "such a crime" (opinion does not state whether "such a crime" is offense charged or prior offense); at trial, defendant did not call any character witnesses; court held that, by failing to call character witnesses, defendant failed to preserve his claim of error, and thus court declined to consider correctness of trial court's ruling).

405.a.060 Once a defendant has introduced evidence of the defendant's own character, the state is entitled to rebut this evidence by testimony in the form of opinion or reputation evidence.

*State v. Miller*, 128 Ariz. 112, 624 P.2d 309 (Ct. App. 1980) (after defendant placed his character trait for truthfulness in issue, proper for state to rebut same with testimony that defendant was untruthful).

405.a.070 Evidence of a victim's specific acts of violence are admissible only when the defendant personally observed those acts or knew of them before the alleged assault or homicide.

*State v. Taylor*, 169 Ariz. 121, 817 P.2d 488 (1991) (evidence of victim's prior conviction for child abuse was admissible because defendant knew of this conviction, and it was relevant to determine whether defendant was justifiably apprehensive about his own safety and safety of two children in apartment).

## ARIZONA EVIDENCE REPORTER

*State v. Santanna*, 153 Ariz. 147, 735 P.2d 757 (1987) (specific acts of violence by victim would be admissible if known to defendant in order to prove defendant's state of mind, but only if defendant's state of mind is relevant; because defendant did not rely on self-defense, and evidence did not show that victim was initial aggressor, violent character of victim was not relevant, thus evidence of victim's character was not admissible).

*State v. Fish*, 222 Ariz. 109, 213 P.3d 258, ¶ 25 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; because defendant did not know of victim's specific acts of violence at time confrontation occurred, defendant was not permitted to introduce evidence of those specific acts of violence).

*State v. Connor*, 215 Ariz. 553, 161 P.3d 596, ¶¶ 12–16 (Ct. App. 2007) (defendant was charged with first-degree murder; defendant contended he was entitled to discovery of victim's medical records to support his claim of self-defense; because defendant made no claim that medical records contained instances of violence about which defendant already knew; defendant would not be permitted to use any instances of violence contained in medical records, assuming there were any, thus defendant was not entitled to disclosure of victim's medical records).

*State v. Roscoe*, 182 Ariz. 332, 897 P.2d 634 (Ct. App. 1994) (because defendant had no prior knowledge of officers' alleged tendencies for aggressiveness or violence, trial court properly precluded any evidence of officers' specific acts of alleged aggressiveness or violence), *vacated on other grounds*, 185 Ariz. 68, 912 P.2d 1297 (1996).

*State v. Cano*, 154 Ariz. 447, 743 P.2d 956 (Ct. App. 1987) (because defendant made no showing he was personally aware of any specific acts of assaultive behavior by guard, he was not entitled to discovery of guard's records for purpose of learning whether they contained information showing that guard was predisposed to provoking altercations).

*State v. Williams*, 141 Ariz. 127, 685 P.2d 764 (Ct. App. 1984) (proper to exclude evidence of victim's violent character when defendant had no knowledge of victim's conduct).

*State v. Zamora*, 140 Ariz. 338, 681 P.2d 921 (Ct. App. 1984) (in prosecution for aggravated assault, proper to exclude testimony that victim belonged to gang called the "Eastsiders" when defendant did not know of this gang, did not know victim was member of such gang, and did not know gang to be violent).

### Paragraph (b) — Specific instances of conduct.

405.b.010 To be an "essential element" under this rule, the character trait must be an operative fact that determines the rights and liabilities of the parties under the substantive law.

*State v. Santanna*, 153 Ariz. 147, 735 P.2d 757 (1987) (because defendant did not claim self-defense, and evidence did not show that victim was initial aggressor, victim's violent character was not relevant, thus evidence of victim's character was not admissible).

*State v. Fish*, 222 Ariz. 109, 213 P.3d 258, ¶¶ 28–29 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; court held that victim's character was not essential element of claim of self-defense, thus defendant was not permitted to introduce evidence of specific acts of violence).

## RELEVANCY AND ITS LIMITS

*State v. Rhodes*, 219 Ariz. 476, 200 P.3d 973, ¶ 16 (Ct. App. 2008) (court held that, when defendant is charged with sexual conduct with child, evidence of defendant's sexual normalcy, or appropriateness in interacting with children, is character trait and one that pertains to charges of sexual conduct with child, but it is not essential element of the crime, thus defendant would not be entitled to offer evidence of specific acts or instances of defendant's conduct).

*In re Jaramillo*, 217 Ariz. 460, 176 P.3d 28, ¶ 11 (Ct. App. 2008) (in sexually violent persons case, state must prove person has mental disorder that makes person likely to engage in acts of sexual violence, thus propensity to commit acts of sexual violence is operative fact that determines rights and liabilities of allegedly sexual violent person, and as such is "essential element" under Rule 405(b), so evidence of specific instances of conduct is admissible to prove such propensity; trial court therefore properly admitted evidence of three prior sexual acts without requiring Rule 404(c) analysis).

*State v. Roscoe*, 182 Ariz. 332, 897 P.2d 634 (Ct. App. 1994) (because defendant was not required to prove that officers had character trait of violent behavior in order to establish his defense of self-defense, and because failure to prove that officers had character trait of violent behavior would not have proved fatal to defense of self-defense, officers' alleged character for aggressiveness or violence was not "essential element" of defendant's defense, thus trial court properly precluded any evidence of officers' specific acts of alleged aggressiveness or violence), *vacated on other grounds*, 185 Ariz. 68, 912 P.2d 1297 (1996).

*State v. Williams*, 141 Ariz. 127, 685 P.2d 764 (Ct. App. 1984) (in murder prosecution where defense is self-defense, victim's intent is not an essential element to be proved by state; therefore, evidence of victim's violent character through his prior armed assaults inadmissible under this rule).

*State v. Lehman*, 126 Ariz. 388, 616 P.2d 63 (Ct. App. 1980) (in assault prosecution in which defendant's sole defense was insanity and in which he attempted to prove he was not a violent person in order to show he must not have known what he was doing, state in rebuttal could not use proof of specific instances of violent conduct on part of defendant for purposes of creating an inference that he had known what he was doing, but rather, under such circumstances, such proof was limited to reputation and opinion testimony because defendant's propensity for violence was not in issue).

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## ARIZONA EVIDENCE REPORTER